(3)

No. 84-1479

IN THE

Supreme Court of the United States

October Term, 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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Questions Presented

1. Whether, in the absence of an intervening change in the law or any other compelling factor, principles of finality of habeas corpus litigation preclude a federal court from reconsidering an issue that has been fully adjudicated by the federal district and appellate courts pursuant to a previous petition for a writ of habeas corpus.

2. Whether repetitious federal review of an issue raised in a successive petition by which a person in state custody challenges a final state judgment necessarily fails to serve the "ends of justice" where, pursuant to a previous petition for a writ of habeas corpus, the same issue received plenary consideration, was fully adjudicated by the federal district and appellate courts and was found by this Court not to warrant a writ of certiorari; where there has been no intervening change in the law; where the claimed constitutional error does not give rise to a substantial question as to the validity of the determination of guilt; and where no other compelling factors have been identified or established.

3. Whether a judgment of the Court of Appeals for the Second Circuit must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254 (d) and without complying with the requirement, announced by this Court in *Sumner* v. *Mata*, 449 U.S. 539 (1981), to explain in writing why one of the exceptions enumerated in § 2254(d) was deemed applicable, the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state hearing court as well as to those of two federal district courts and a majority of a prior panel of the same Court of Appeals.

4. Whether the presumptively correct state court finding that Wilson's inculpatory jailhouse statement to an un-

disclosed government agent was spontaneous and not deliberately elicited—a finding supported by direct and uncontradicted hearing testimony regarding the circumstances surrounding the statement—negates the inference of deliberate eliciting that, under *United States* v. *Henry*, 447 U.S. 264 (1980), might be drawn in the absence of such direct evidence.

5. Whether, if *United States* v. *Henry*, 447 U.S. 264 (1980), represented a change in the law sufficient to warrant the Second Circuit's reversal of its own prior judgment, it should be deemed a new rule of law and should not be applied retroactively in a habeas corpus proceeding.

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Opinions Below

The opinion of the Court of Appeals (Pet. App. A., pp. 1a-20a) is reported at 742 F.2d 741 (2d Cir. 1984). The opinion of the District Court (Pet. App. C, pp. 23a-29a) is not reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 27, 1984. A timely petition for rehearing with a suggestion for rehearing en banc was denied on December 17, 1984 (Pet. App. B, pp. 21a-22a). The petition for a writ of certiorari was filed on March 18, 1985, and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Sixth and Fourteenth Amendments to the United States Constitution, United States Code, Title 28, sections 2244(b) and 2254(d), and Rule 9(b) of the Rules Governing United States Code, Title 28, section 2254 (Pet. pp. 2-5).

Statement of the Case

This case arises from Joseph Allan Wilson's second petition for a writ of habeas corpus, in which he asserted, as he had in his first petition, that the introduction, at his state court murder trial, of a statement he made to a cellmate violated his Sixth Amendment right to counsel. Although both the District Court and the Court of Appeals had rejected Wilson's constitutional claim upon his first petition, and this Court had denied a petition for a writ of certiorari, Wilson asserted that this Court's decision in *United States* v. *Henry*, 447 U.S. 264 (1980), changed the law regarding such statements and that it was retroactively applicable to Wilson's case. The District Court denied the petition based upon its determination that Wilson's case was factually distinguishable from *Henry*. The Court of Appeals, while rejecting Wilson's theory that *Henry* changed the law, nonetheless reconsidered his claim, found that the facts of the present case were not distinguishable from those of *Henry*, held that its own prior decision was incorrect, and reversed the District Court's order.

1. In the early morning of July 4, 1970, Joseph Allan Wilson and two others committed a robbery at the Star Taxicab Garage, during which Sam Reiner, the sixty-five-year-old night dispatcher, was shot and killed. Shortly before the murder, three Star employees observed Wilson, who, approximately a year and a half earlier, had been discharged from a job at the garage, and whose brother worked there at the time of the crime, on the garage premises; two of them saw him conversing at length with his two accomplices and one observed him spend approximately twenty minutes reconnoitering the various rooms of the garage (Tr. 209-10,

216-17, 268-275, 278, 297-303, 310-12, 415). While Wilson and his accomplices were on the premises, Joshua Deutsch, one of the Star employees, spoke briefly with Sam Reiner in the dispatcher's office (Tr. 448-49). Some moments later, from the front of the drivers' waiting room, he saw Wilson's two companions fleeing with money in their arms (Tr. 453-55). Mr. Deutsch then looked into the dispatcher's office, where he saw Sam Reiner lying on the floor, amid scattered money, with blood trickling from his mouth (Tr. 457-58). The office telephone was dangling from its hook (Tr. 330-31, 467-68).*

Mr. Deutsch ran to the body shop and told George Allen, another Star employee, what he had seen; seconds later, the two employees ran back toward the dispatcher's office (Tr. 322, 324-26, 461-63). As they did, they saw Wilson fleeing from the dispatcher's office cradling loose money in his arms (Tr. 326-28, 463). As he ran past them, Wilson said, "Keep cool. I've left something on the floor for you" (Tr. 328, 464).

Upon his arrest, four days later, Wilson admitted to Detective Walter Cullen that he had been at the scene of the crime and that he had fled along with the other two men after the shooting. He claimed, however, that he had merely been a bystander and that the perpetrators were strangers to him (Tr. 369-78).

2. On July 7, 1970, prior to Wilson's arrest, Detective Walter Cullen spoke to Benny Lee, an inmate at the Bronx House of Detention, who was being held on a charge of Robbery in the Third Degree (JA. 43). Detective Cullen told Lee that he expected to arrest Wilson shortly for a crime perpetrated by three individuals and "asked Mr. Lee if he would be willing to keep his ears open, not to inquire, or to question this defendant if he was put in the same cell with

* Apparently because of the loud noise generated by the garage air compressors, which were in constant operation (Tr. 233, 336, 350-56, 473-79), no witnesses heard the sound of gunshots. The medical examiner's subsequent autopsy disclosed that Sam Reiner had suffered two .22 calibre bullet wounds to the left side of his chest (Tr. 565-68).

him, but more or less to keep his ears open as to the other two perpetrators'' (JA. 24, 37). Lee indicated that he understood the nature of the request and, without receiving any promise of compensation or leniency from Detective Cullen, agreed to provide the requested assistance (JA. 37, 43, 45-46).

Shortly thereafter, Wilson, having been arrested and arraigned, was assigned to Lee's cell, which was in an area from which the nearby Star Taxicab Garage was visible (JA. 38). Upset by the view, Wilson began discussing his pending charges with Lee and asserted, consistently with his previous exculpatory statement to Detective Cullen, that he had observed two strangers commit the robbery and murder and that he had simply picked up some money that they dropped (JA. 38-39). Although Lee remarked that the story ''didn't sound too good'' and that ''things didn't look too good'' for Wilson, Wilson ''stuck to the story'' and maintained that it was an accurate account of what had happened (JA. 39).

Several days later, Wilson was visited by his brother, who conveyed to Wilson that their family was distraught over his role in the killing of Sam Reiner (JA. 41-42). Lee observed that ''this upset him very much and that would start him to talking about different things, about the crime and different things'' (JA. 42). During the ensuing two days, Wilson gradually changed his version of the crime until, ultimately, he told Lee that, being familiar with the layout of the Star Taxicab Garage and knowing that it would be a vulnerable target over the weekend, he had planned the robbery with the two other men (JA. 40). After describing how he had ''cased'' the premises and then ushered in his companions, Wilson admitted to Lee that ''[w]e shot the man'' and that afterwards, ''[w]e picked up the money and left'' (JA. 40).

During the entire period of nine to ten days that he and Wilson shared a cell, Lee never posed questions to Wilson in an effort to uncover information (JA. 39-40, 42). All of

the statements recounted in Lee's testimony were initiated by Wilson (JA. 42).

3. Pursuant to *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), the state court, in 1972, conducted a hearing to determine the admissibility at trial of Wilson's statements. Based on its findings that Benny Lee was instructed not to ask questions, but merely to listen to Wilson, that Lee adhered to those instructions, and that Wilson's utterances in Lee's presence were spontaneous, unsolicited and voluntary, the court determined that Wilson's constitutional rights had not been violated and that his statements to Lee would be admissible at trial (JA. 62-63). After the trial, at which the statements were introduced, the Supreme Court of the State of New York, Appellate Division, First Department, unanimously and without opinion, affirmed Wilson's conviction. *People* v. *Wilson*, 41 A.D.2d 903, 343 N.Y.S.2d 563 (1st Dept. 1973). The Court of Appeals of the State of New York denied Wilson's application for leave to appeal.

4. In his original petition for a writ of habeas corpus, Wilson claimed that the admission at trial of his statements to Lee violated his constitutional rights (JA. 115, 125-27). On January 7, 1977, the District Court for the Southern District of New York, after citing *Massiah* v. *United States*, 377 U.S. 201 (1964), rejected this claim because ''[t]he record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner'' (Pet. App. D, p. 32a). On his appeal from the District Court's order denying his petition for a writ of habeas corpus, Wilson, who was represented by counsel, again argued that the statements to Lee were deliberately elicited in violation of *Massiah*. The Court of Appeals for the Second Circuit, by a two-judge majority, rejected that claim, holding that ''there must be some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible.'' *Wilson* v. *Henderson*, 584 F.2d 1185, 1190 (2d Cir. 1978) (Pet. App. E, p. 38a). The court distinguished Wilson's case from

Brewer v. *Williams*, 430 U.S. 387 (1977), in which this Court found that a detective deliberately elicited incriminating statements even though he did not interrogate the defendant, because "Lee did not interrogate Wilson, *nor in any way attempt to deliberately elicit incriminating remarks . . .*". 584 F.2d at 1191 (Pet. App. E, pp. 40a-41a). (emphasis added). A subsequent application for a rehearing en banc was denied, *Wilson* v. *Henderson*, 590 F.2d 408 2d Cir. 1979) (Pet. App. F, pp. 46a-47a), and this Court denied a petition for a writ of certiorari. *Wilson* v. *Henderson*, 442 U.S. 945 (1979).

5. Commencing in 1981, a new round of litigation regarding the constitutionality of Wilson's statement to Lee followed in the wake of *United States* v. *Henry*, 447 U.S. 264 (1980), *aff'g*, 590 F.2d 544 (4th Cir. 1978), in which this Court affirmed the Fourth Circuit's decision—which had been published prior to the denial of Wilson's suggestion for rehearing—holding that, under the circumstances of that case, a government agent's jailhouse conversation with the accused constituted "deliberate elicitation" in violation of the principles announced in *Massiah*. After a New York State court found, on November 20, 1981, that *Henry* was factually distinguishable from Wilson's case, that *Henry* should not be applied retroactively, and, therefore, that it did not support Wilson's motion for post-judgment relief (JA. 129), and after Wilson's application for further state appellate review was denied, he filed, in 1982, a second petition for a writ of habeas corpus (JA. 130-50). As before, Wilson claimed that his statements to Lee were deliberately elicited in violation of the Sixth Amendment (JA. 137). His claim that he was entitled to relief on that previously rejected ground was premised solely on his theory that "*Henry* changed the law" (JA. 145) by creating a new test for determining when a statement is "deliberately elicited" and thereby rendered invalid the prior determination that the statements were obtained constitutionally (JA. 149-50).

In opposition, the State argued that *Henry* did not alter the constitutional principles and standards that were ap-

plied when Wilson's original petition was adjudicated and, therefore, that his successive petition on identical grounds should be dismissed pursuant to 28 U.S.C. § 2244(b); that the present case is factually distinguishable from *Henry*; and that, if *Henry* did promulgate a new constitutional rule, it should not be applied retroactively.

In an opinion issued on March 30, 1983, the District Court did not address the contention that Wilson's successive petition should be dismissed pursuant to 28 U.S.C. § 2244(b), but proceeded to the merits of Wilson's claim. Because "[t]he testimony at the *Huntley* hearing established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother," the District Court found that the record supported the state court's finding that Wilson's statements were spontaneous and, therefore, accorded that finding the presumption of correctness as required by 28 U.S..C § 2254 (Pet. App. C, p. 28a). And, because that finding negated the inference that Lee affirmatively secured statements, the District Court found that Wilson's case was distinguishable from *Henry* and dismissed the petition.

On August 27, 1984, a two-judge majority of the Court of Appeals for the Second Circuit declared that, "notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (Pet. App. A, p. 6a). Without any reference to the District Court's finding that the confession was a response to the disturbing visit by Wilson's brother, the Court of Appeals rejected both the District Court's conclusion that *Henry* was distinguishable and, implicitly, the underlying state court finding that Wilson's statements were spontaneous (Pet. App. A, pp. 9a-10a). Finally, the panel majority concluded that, although *Henry* worked so substantial a change in Sixth

Amendment analysis that it warranted the invalidation of the prior decision of the Court of Appeals, it did not establish a "new" constitutional rule for purposes of determining whether it should be applied retroactively (Pet. App. A, pp. 12a-16a). The majority thereupon reversed the District Court's order.

Summary of Argument

I. On July 4, 1970, Joseph Allan Wilson, and two accomplices who were never apprehended, murdered Sam Reiner during a robbery at the Star Taxicab Garage in The Bronx. Throughout the course of the subsequent federal habeas corpus proceedings, the "accuracy" of the state jury's verdict has never been challenged by Wilson. *See Solem* v. *Stumes*, 465 U.S. 638, 104 S. Ct. 1338, 1342-43 (1984). Nor could it be. In addition to the incriminating admissions made by Wilson to a jailhouse informant, which are the subject of the extensive constitutional litigation that has now brought the case before this Court, there was a wealth of compelling circumstantial evidence that firmly established Wilson's guilt (*see* pp. 2-3, *supra*). Thus, the dissenter in the Court of Appeals was surely justified in his observation that, even without the benefit of the incriminating statements made by Wilson to the informant, the evidence against Wilson was overwhelming, as the "police had . . . [Wilson] dead to rights" (Pet. App. 17a).

Yet, while there could be no serious question that Wilson murdered Sam Reiner, over the past fifteen years there has been an abundance of debate in both the state and federal courts as to whether Wilson's post-arraignment admissions of guilt to the jailhouse informer, Benny Lee, were "deliberately elicited" from Wilson in violation of his Sixth Amendment right to counsel under principles first articulated in *Massiah* v. *United States*, 377 U.S. 201 (1964). During the many years of successive legal proceedings, which came before the recent, second appeal to the Court of Appeals, Wilson was afforded (and he does not claim

otherwise) no less than six full and fair opportunities to litigate the merits of his Sixth Amendment claim in the state and federal courts, including an earlier habeas corpus appeal heard by a different Court of Appeals panel.* *See* pages 5-8, *supra*. Common to the rulings that expressly declared Wilson's constitutional argument to be meritless were specific determinations by those courts that there had been no "deliberate elicitation" of the admissions by the jailhouse informant, who had been instructed to refrain from questioning Wilson about the crime, and only to listen to Wilson for the sole purpose of learning the identities of the two accomplices. Furthermore, Wilson's self-incriminating statements, which followed a distressing visit by Wilson's brother, were found by those courts to be "spontaneous" (Pet. App. C, p. 28a; D, p. 32a), "completely unsolicited" (Pet. App. E, p. 41a), and "voluntary" (Pet. App. E, p. 41a).

Eventually, however, on his second appeal to the Court of Appeals, Wilson found a forum that was more sympathetic to his constitutional argument. By a judgment issued more than 14 years after the murder of Sam Reiner, a divided panel of the Court of Appeals discovered what it perceived to be a Sixth Amendment violation, notwithstanding the court's contemporaneous conclusion that

* The courts that rejected Wilson's Sixth Amendment argument on the merits were: the state trial court at a pre-trial suppression hearing (1972); the state intermediate appellate court (1974) (unanimous affirmance without opinion); the federal district court on the first habeas petition (1977); a panel of the Court of Appeals on the first habeas petition (1978); the state court which considered a motion to vacate judgment (1981); and the federal district court on the second habeas petition (1983).

Additionally, four other courts refused to afford Wilson a discretionary, further review of the constitutional claim: a judge of the New York Court of Appeals who denied Wilson's application for permission to appeal to that court (1974); the full United States Court of Appeals, which denied an application for rehearing en banc following the first unsuccessful appeal (1979); this Court, which denied Wilson's petition for certiorari after his first habeas appeal (1979); and the state intermediate appellate court, which denied Wilson's application for permission to appeal from the denial of his motion to vacate judgment (1981).

Henry had not meaningfully changed the law from what it had been when the host of previous courts, including a prior panel of the Court of Appeals, had reached the opposite conclusion (Pet. App. A, 1a-16a). Thus, with one broad stroke the most recent Court of Appeals panel nullified not only Wilson's murder conviction and 20-years-to-life sentence, but also more than a dozen years of directly contrary judicial rulings that preceded it. Furthermore, the important factual determinations of "spontaneity," which underlay those rulings that the statements had not been "deliberately elicited," were simply disregarded. The state was directed to return to "square one" and belatedly start the prosecutorial process all over again—the state had to retry Wilson or release him (Pet. App. A, p. 16a). To justify this extreme result, the panel majority intoned, ironically, the words "ends of justice," which it drew from this Court's opinion in *Sanders* v. *United States,* 373 U.S. 1, 15, 16-17 (1963) (Pet. App. A, 6a).

Hence, the present case now calls for this Court to resolve an important and frequently recurring question of federal habeas corpus jurisprudence. Should a state prisoner who has had at least one full and fair opportunity to litigate the merits of a constitutional claim both in the state courts, during the criminal action, and in the federal courts, on habeas corpus, be allowed to persist in assailing the federal judiciary with successive identical habeas petitions, in the hope, and, as this case demonstrates, with the very real possibility that his second, third, fourth or some later bite at the federal habeas apple will find a court that is willing to exercise its discretion by entertaining the merits of the repetitive petition in order to serve what that court perceives to be the amorphous "ends of justice"? We urge the Court to answer that question in the negative, and rule instead that once a state prisoner has had one full and fair opportunity to be heard on the merits of his constitutional claim in a federal habeas corpus proceeding, the curtain of finality must ordinarily fall. Other federal courts subsequently confronted with the identical issue in a new habeas

corpus proceeding must consider themselves precluded from considering that issue on the merits unless the petitioner has presented newly-found material facts, or demonstrated that there has been an intervening change in the law that should be entitled to retroactive, collateral application in a habeas corpus proceeding. Put somewhat differently, absent such special circumstances, a federal court must consider itself without discretion to reconsider an identical claim already fully litigated by the state prisoner on the merits, in a prior federal habeas action, because the "ends of justice" can never warrant such an unreasonable and unnecessary perpetuation of the non-finality of a state criminal conviction.

Indeed, even if the Court were not inclined to accept this generalized rule of issue preclusion as appropriate for "pure" legal questions, at the very least then, previous federal determinations of questions of fact or mixed questions of law and fact, of the type so cavalierly disregarded by the recent Court of Appeals panel in this case, should not be subject to further litigation in subsequent habeas corpus proceedings. The law can change, or possibly be misinterpreted, but historic facts, once found after a full and fair consideration, can never change, absent the discovery of additional new facts which materially bear upon the correctness of the original factual determination.

Of course, we recognize that the declaration of a generally firm rule of issue preclusion for habeas matters involving state prisoners might appear to be, in some respects, inconsistent with dictum contained in *Sanders* v. *United States,* 373 U.S. at 18-19, and with some of the principles articulated in a few of the older habeas cases. *See, e.g., Salinger* v. *Loisel,* 265 U.S. 224, 230-231 (1924). But, strong support for the rule we propose is to be found in a number of this Court's cases decided during the two decades following *Sanders.* In the recent evolution of the Court's habeas corpus jurisprudence, it has been recognized that, notwithstanding the great deference to be paid to federal habeas corpus, the "Great Writ," equally compelling concerns about the great costs exacted by the writ—

the disruption of federal-state comity and principles of federalism, the increased burden placed on overtaxed judicial resources, the pressing needs for finality in state criminal cases and for consistency in federal decision making, and the ultimate miscarriage of justice that frequently attends the granting of the writ so long after conviction, making successful reprosecution of an obviously guilty defendant highly problematical—all militate against an unnecessarily "liberal allowance of the writ." *See, e.g. Engle* v. *Isaac,* 456 U.S. 107, 126-28 (1981); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 263-265 (1973) (Powell, J., concurring); *see, also, Barefoot* v. *Estelle,* 463 U.S. 880, 77 L.Ed.2d 1090, 1100-01 (1983).

Moreover, and perhaps of greater significance, the pronouncement of this rule of issue preclusion would be consonant with, and of aid in effectuating, the intent of Congress to limit, and bring more finality to, federal habeas litigation when, in 1966, three years after this Court's decision in *Sanders,* it amended 28 U.S.C. § 2244, the statute governing the availability of federal habeas corpus to state prisoners in successive petition situations, making the statutory "ends of justice" language construed in *Sanders* wholly inapplicable to state prisoners.

Yet, even if the Court were to allow for a continuation of the "ends of justice" approach to the evaluation of successive, identical claims, the result which we now urge, in the form of the new, qualified rule of issue preclusion, need not be refused. This Court, appropriately exercising its supervisory powers over the federal judiciary, may certainly require that a more objective, understandable standard be employed in determining whether the "ends of justice" might allow for the re-entertaining of a previously-rejected constitutional claim. Surely, something more than mere disagreement with the factual conclusions and constitutional analysis of an earlier bench of coordinate jurisdiction should be insisted upon before discretionary reconsideration of an otherwise final ruling may justifiably occur. Accordingly, we ask the Court to rule that, particularly in view of the Congressional motives underlying the

1966 amendment of 28 U.S.C. § 2244 and the constant federal-state frictions and problems emanating from habeas corpus review of state criminal judgments, a federal court would not be serving the "ends of justice" by granting discretionary merits reconsideration absent newly-found material facts, or the intervening promulgation of a new, retroactive principle of constitutional law. And, to effectuate this rule, the federal courts should be required to indicate, expressly, what objective bases of this sort are present in a particular case, warranting such merits reconsideration by a later habeas court.

Applying a rule of qualified issue preclusion to the circumstances of this case, the Court will see that the most recent Court of Appeals panel was unwarranted in entertaining the merits of Wilson's repetitive constitutional argument on his second appeal to that court, particularly in view of the Court of Appeals' own conclusion that, even with *Henry,* there had been no real change in the applicable law. And, certainly, the Court of Appeals' unjustified willingness to brush aside the factual determinations of the courts which preceded it can not be countenanced.

II. A state hearing court determined, after an evidentiary hearing, that Wilson's statements to Lee were spontaneous and unsolicited. Those findings of historical fact are entitled to a "high measure of deference" and, pursuant to 28 U.S.C. § 2254(d), must be presumed correct by a federal habeas court unless one of eight enumerated exceptions applies. Unlike all of the previous federal courts that had considered the hearing record in this case, however, the recent Court of Appeals panel failed to comply with the statutory mandate or with this Court's requirement that the reasons for deeming an exception applicable be articulated. Instead, the Court of Appeals relied on its own findings of fact which, in addition to disregarding the state court's findings, are largely at variance with the record.

The Court of Appeals based its legal conclusions on a scenario in which a detective, intent on gathering as much information from Wilson as he could, strategically played upon Wilson's emotions by exposing him to a view of the

scene of his crime and to a cellmate-informant, who bombarded him with a continuous barrage of psychologically subtle derision, which ultimately caused Wilson to grow so troubled that he admitted his guilt. These "facts" led to the Court of Appeals' determination that Wilson's statements were "the product of" his conversations with Lee and that this case was constitutionally indistinguishable from *United States* v. *Henry*, 447 U.S. 264 (1980). The uncontradicted hearing testimony, which underlies the state court finding of spontaneity, however, established that the detective's sole purpose in enlisting Lee's aid was to learn the identities of two unapprehended murderers and that Wilson incriminated himself, not as a result of any active efforts by Lee, but as a response to a disturbing visit in which Wilson's brother conveyed their family's outrage at Wilson's role in the murder of Sam Reiner.

In view of the facts supported by the record and reflected in the state court's findings, the present case is distinguishable from *Henry*, which turned on a factual conclusion that the government was responsible for the informant's deliberate efforts to secure incriminating information. Wilson's incriminating statements were not prompted by anyone connected to the state, but by his own brother. Moreover, here, in contrast to *Henry*, the state did not implicitly encourage the informant to induce incriminating statements by arranging to pay him only if he provided useful information. Thus, the facts of this case, unlike those of *Henry*, do not establish that the state "deliberately elicited" statements from a defendant in violation of his right to counsel.

Where, as here, an informant served solely as a passive listener, the constitutional right to counsel is not implicated. The historical concerns underlying the Sixth Amendment come into play only in those extra-judicial situations that entail a "trial-like confrontation" for which a defendant requires counsel to offset the government's adversarial advantage. Where the government informant's role is limited to listening to unsolicited utterances, there is no such confrontation. Thus, under the circumstances of the present case, no Sixth Amendment violation occurred.

ARGUMENT

POINT ONE

The Court of Appeals erred in granting Wilson habeas corpus relief where the identical claim had been rejected previously after he had been allowed a full and fair opportunity to litigate that claim on the merits in an earlier habeas proceeding before a different panel of the Court of Appeals, and where there had been no intervening change in the law entitled to retroactive application on habeas corpus and no presentation of any newly-found facts which might have had a material impact on the correctness of the original habeas determination.

A. In view of the 1966 congressional amendment of 28 U.S.C. § 2244, the dictum contained in this Court's earlier decision in *Sanders* v. *United States* should not be accepted as governing the disposition of successive, identical habeas corpus claims by state prisoners; the Court should announce and apply a new, qualified rule of issue preclusion, requiring that a successive, identical claim be summarily rejected, absent special circumstances that are not presented by the instant case.

1. The Court of Appeals rejected Wilson's argument that *United States* v. *Henry*, 447 U.S. 264 (1980), created new Sixth Amendment law of retroactive effect, entitling him to relief on a second habeas petition despite his having been completely unsuccessful previously when he presented the identical claim to the District Court and a different Court of Appeals panel on an earlier habeas petition (Pet. App. A, 12a-14a). The most recent panel agreed with the State's argument "that *Henry* merely applied the 'deliberately elicited' test of *Massiah* to new facts," and refused to read "*Henry* as establishing a 'likely to induce test' that fundamentally restructures *Massiah*" (*Id.* at 13a). Nevertheless, the Court of Appeals held that, "notwithstanding

that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (*Id.* at 6a).

The Court of Appeals found that it had been granted a license by this Court's decision in *Sanders* v. *United States,* 373 U.S. 1 (1963), to rehash, if it so wished, the merits of Wilson's identical Sixth Amendment claim. In *Sanders,* the Court was called upon to rule whether a federal prisoner's second motion to overturn his conviction pursuant to 28 U.S.C. § 2255, the equivalent of a habeas corpus vehicle for federal prisoners, was improperly denied without a hearing, where the second petition raised a claim that had not been presented to the District Court on an earlier section 2255 motion. On the way to deciding that *res judicata* did not bar reconsideration of the second petition containing the newly raised claim,* the Court found that "the judicial and statutory principles governing successive applications for federal habeas corpus and motions under section 2255 has reached the point at which the formulation of basic rules to guide the lower federal courts is both feasible and desirable." 373 U.S. at 15. In what must be recognized as dictum, the Court first promulgated its oft-repeated rules by which successive petitions, raising claims identical to those previously rejected after a consideration on the merits, were to be considered. 373 U.S. at 15-17. Then, more directly addressing the situation pre-

* The Court rejected any notion that *res judicata* might bar reconsideration of a successive petition by linking older case law standing for the proposition that principles of *res judicata* did not pertain to habeas corpus, because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged" (373 U.S. at 8), with the Court's observation that the codification of section 2244 "was not intended to change the law as judicially evolved." 373 U.S. at 11. To support the latter conclusion about congressional intent, the Court pointed to the "Reviser's Note," and the pertinent fact that "language in the original bill which would have injected *res judicata* into federal habeas corpus was deliberately eliminated from the act as finally passed. *See* S. Rep. No. 1559, 80th Cong., 2d Sess. 9; Moore, Commentary on the United States Judicial Code (1949), 436-438." 373 U.S. at 11.

sented by Sanders himself, the Court announced rules governing the manner by which successive petitions raising new claims, which implicated the common law concept of "abuse of the writ," were to be determined.* 373 U.S. at 17-18.

Interpreting and applying 28 U.S.C. § 2244, which, as it then existed, was expressly addressed to both state and federal prisoners,** the Court declared that when a federal

* Conceptually, it would seem that the bringing of successive petitions raising an issue identical to one previously determined on the merits is the greater "abuse of the writ." However, in the argot of habeas corpus jurisprudence, the term "abuse of the writ" has been limited to discussions of those situations in which the successive petition raises an entirely new ground for relief which had been completely withheld from an earlier petition (*see, e.g., Rose* v. *Lundy,* 455 U.S. 509, 520-521 [1982]; *Price* v. *Johnston,* 334 U.S. 266, 292-293 [1948]; *Potts* v. *Zant,* 638 F.2d 727, 740-741 [5th Cir. 1981]), or situations where the earlier petition did originally contain the same claim, but there had been an abandonment of the claim before it was considered on the merits. *See, e.g., Wong Doo* v. *United States,* 265 U.S. 239, 241 (1924).

In the case now before the Court, Wilson presented no new claims in his second petition and, therefore, "abuse of the writ" principles are largely irrelevant. Furthermore, we do not argue that the rule of issue preclusion now proposed for "identical successive claim" situations be extended to "abuse of the writ" cases. *See,* p. 20, n., *infra; cf. Woodard* v. *Hutchins,* 464 U.S. 377, 104 S.Ct. 752, 753 (Burger, C.J., and Powell, Blackmun, Rehnquist and O'Connor, JJ., concurring), and 104 S.Ct. at 755 (White, Stevens, JJ., concurring).

** 28 U.S.C. 2244, c. 646, 62 Stat. 965, June 25, 1948, which consisted of but a single paragraph, provided as follows:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person *pursuant to a judgment of a court of the United States, or of any State,* if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents *no new ground* not theretofore *presented and determined, and* the judge or court *is satisfied* that the *ends of justice will not be served by such inquiry*" (emphasis added).

The 1966 amendment of § 2244 struck out the language making this paragraph, now subsection (a), applicable to state prisoners, and instead added subsections (b) and (c), which are applicable to state prisoners exclusively. Pub. L. 89-711, § 1, 80 Stat. 1104 (1966).

court is confronted with a successive habeas petition raising a claim identical to one previously rejected on the merits, "controlling weight may be given to denial of . . . [the] prior application . . . *only if* (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, *and* (3) the *ends of justice would not be served by reaching the merits of a subsequent application.*" 373 U.S. at 15 (emphasis added). After providing a few, non-exhaustive examples of situations in which the "ends of justice" would require the consideration of a successive, identical petition,* the Court placed the burden of proving that the "ends of justice" warranted reconsideration of a previously rejected identical claim on the prisoner. 373 U.S. at 17. The Court also observed that it was, in the end, always for the "federal trial judges" to decide whether they should exercise their discretion in favor of considering the merits of a successive writ. 373 U.S. at 18-19.

Basically, then, *Sanders'* three-pronged test for determining the *de novo,* discretionary reviewability of a state prisoner's successive, identical claim was established by the Court in an exercise of statutory interpretation, guided in large part by the Court's perception of congressional intent. Accordingly, it must surely be recognized as being of considerable import that in 1966 Congress rendered the statutory underpinnings of the *Sanders'* "ends of justice" analysis wholly inapplicable to state prisoners raising successive, identical claims. In that year, as noted (*see* p. 17, n., *supra*), Congress amended section 2244 by excluding state prisoners from the scope of former section 2244, which otherwise remained intact and applicable to federal pris-

* "If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair . . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." 373 U.S. at 16-17.

oners, exclusively, as section 2244(a). Pub. L. 89-711, § 1, 80 Stat. 1104 (1966). Instead, state prisoners became encompassed by newly added subsections (b) and (c).*

Section 2244(b), both as enacted and as currently in effect, provides that if, "after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law," a federal court has denied a state prisoner's constitutional habeas claim, a subsequent petition for habeas relief brought by the prisoner "need not be entertained" by the federal courts unless "the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application of the writ, *and* unless the court, justice or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."** (Emphasis added). Nowhere in section 2244(b) is there any mention of the "ends of justice."

The congressional intent attending the amendment of section 2244 is discussed in Senate Report 1797, accompanying H.R. 5958, 89th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News, 3663-3672 (1966). Congress chose to amend section 2244 by enacting subsections (b) and (c) in order to deal with the ever-swelling tide† of federal habeas corpus litigation by state prisoners:

> ". . . . In many instances the burden has been an unnecessary one, since the State prisoners have been

* Subsection (c), which pertains to state habeas petitioners who have already obtained from this Court a merits determination on a constitutional issue, is not directly relevant to the instant case.

** The pertinent text of § 2244(b) is to be found in Pet., pp. 4-5.

† The Senate Report set forth some statistics showing the increase in state habeas litigation over the years; in 1941 there were 141 habeas writs filed in the federal courts by state prisoners, and by fiscal 1965 the annual count was up to 4,845 petitions. U.S. Code Cong. & Ad. News, 3663-64 (1966). Since then, the annual number of habeas petitions filed by state prisoners has almost doubled: 8,349 (fiscal 1984); 8,532 (fiscal 1983); 8,059 (fiscal 1982); 7,790 (fiscal 1981); 7,031 (fiscal 1980). Source: Annual Report of the Director, Administrative Office of the United State Courts (1984), Table 24, p. 143.

filing applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they filed the preceding application. The bill seeks to alleviate the unnecessary burden *by introducing a greater degree of finality of judgments in habeas corpus proceedings.*

* * *

The purpose of these new subsections [(b) and (c)] is to add to section 2244 of title 28, United States Code, *provisions for a qualified application of the doctrine of res judicata.*" 1966 U.S. Code Cong. & Ad. News, at p. 3664. (Emphasis added).

In consonance with the stated intention of Congress to bring a "greater degree of finality" and "a qualified application of the doctrine of res judicata" to habeas corpus litigation involving state prisoners, section 2244(b) erased the "ends of justice" hurdle that once had to be bounded over by a federal judge before a successive, identical petition might be summarily dismissed. Instead, subsection (b) imposes the requirement that only a new claim, not improperly withheld on a previous occasion, be entertained on the merits. Implicit in this new statutory scheme was a rejection of and departure from the *Sanders* approach to dealing with a state prisoner's successive, identical claim. After all, if *Sanders* satisfied congressional concerns, the subsequent amendment of section 2244 would have been unnecessary.* Whereas the *Sanders* analysis was predicated

* The State does not dispute that the *Sanders* approach to petitions containing new claims, rather than claims previously rejected on the merits, was left substantially unchanged by the 1966 amendments. Indeed, that § 2244(b) and the related habeas corpus Rule 9(b) (*see* Pet., p. 5), were designed to incorporate the *Sanders'* abuse of the writ analysis is confirmed by the Advisory Committee Note and the House Judiciary Committee report attending the enactment of Rule 9(b). *See* 28 U.S.C.A. foll. § 2254, Rule 9, Pub. L. 94-426 § 2(7), (8), 90 Stat. 1335 (Sept. 18, 1976), Advisory Committee Note, pp. 1138-39; H. Rep. 94-147, *reprinted in* 1976 U.S. Code

(footnote continued on next page)

on the assumption that Congress had completely eschewed the application of any *res judicata* principles to habeas corpus in 1948, by 1966 the Congressional objectives in this respect had, as expressly stated in Senate Report 1797, changed. Section 2244(b), thus, strongly favors the presumption that, as a matter of course, repetitive claims would be quickly disregarded, except in the most special of circumstances.

Admittedly, however, as illustrated by the instant case, the demise of the *Sanders* "ends of justice" loophole for avoiding finality went largely unnoticed by the federal judiciary. In the more than two decades since *Sanders,* many courts—even this one—seemed to accept without question that the "ends of justice" standard was still extant.* *See,*

Cong. & Ad. News, 2478, 2481-82. *See Rose* v. *Lundy,* 455 U.S. 509, 520-521 (1982).

In contrast, the Advisory Committee Note, in discussing the provisions of Rule 9(b) pertaining to successive, identical claim petitions ("A second or seccessive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . .") first notes the original language of the three-part *Sanders'* test, and then goes on to state that:

> "[t]he requirement [of Rule 9(b)] is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since Sanders."

Nowhere in the Advisory Committee note is there a suggestion that *Sanders'* "ends of justice" requirement survived the 1966 statutory amendment.

* Indeed, before the Court of Appeals, although the State argued that principles of finality required the conclusion that Wilson's second petition not be entertained on the merits, it did not dispute, and even assumed, without review of section 2244(b)'s legislative history, that the *Sanders'* "ends of justice" test was still an applicable rule of law. *See* State's brief in Court of Appeals, p. 12, and State's Petition for Rehearing and Suggestion for Rehearing en Banc, p.6. This assumption, however, does not preclude the present argument from being made in support of the State's continued finality arguments. *See generally, Illinois* v. *Gates,* 462 U.S. 213, 76 L.Ed.2d 527, 554 (1983) (White, J. concurring); *Fuller* v. *Oregon,* 417 U.S. 40, 58 (1974); *Stanley* v. *Illinois,* 405 U.S. 645, 658, n. 10 (1972); *Raley* v. *Ohio,* 360 U.S. 423, 437 n.12 (1959); *Dewey* v. *Des Moines,* 173 U.S. 193, 198 (1899).

e.g., Antone v. *Dugger,* 465 U.S. 200, 104 S. Ct. 962, 965 (1984) ("Nor has the applicant shown any basis for disagreeing with the finding of the District Court and the Court of Appeals that the ends of justice would not be served by reconsideration of those claims previously presented on federal habeas"); *Johnson* v. *Wainwright,* 702 F.2d 909, 911 (11th Cir. 1983); *Cancino* v. *Craven,* 467 F.2d 1243 (9th Cir. 1972); *United States ex rel. Townsend* v. *Twomey,* 452 F.2d 350 (7th Cir. 1972); *United States ex rel. Schnitzler* v. *Follette,* 406 F.2d 319, 321 (2d Cir. 1969).

This has given rise to no remarkable controversy, however, because in most instances, after paying homage to the "ends of justice" analysis, the courts have generally applied section 2244(b) as a firm bar to the relitigation of successive, identical claims previously heard on the merits where there has not been an intervening, true change in the law. *But cf. Bass* v. *Wainwright,* 675 F.2d 1204, 1207 (11th Cir. 1982) ("plain error" in earlier merits decision required hearing on second petition to serve "ends of justice"); *accord, Cancino* v. *Craven,* 467 F.2d at 1246. Moreover, even those courts and commentators who have recognized the deletion of the "ends of justice" language by the 1966 amendment of section 2244 express some confusion and doubt as to what impact the new statutory langauge had on the previous approach established by *Sanders. See, e.g., Walker* v. *Lockhart,* 726 F.2d 1238, 1242, n.10 (8th Cir.), *cert. dismissed,* 105 S. Ct. 17 (1984); *St. Pierre* v. *Helgemoe,* 545 F.2d 1306, 1307-08 (1st Cir. 1976); *Developments in the Law: Federal Habeas Corpus,* 83 Harv. L. Rev., 1038, 1151-52 (1970) ("The congressional purpose in excluding reference to the "ends of justice" *was probably* to discourage use of that exception without expressly limiting it in any formal way") (emphasis added); *and cf.* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 4267, pp. 689-690 (1978) (Reading "ends of justice" language into section 2244(b)—"Thus the statute does not interfere in any way with the power of the court to consider the second application when the ends of justice require it").

Now, however, with the extreme results of the instant case, engendered by the Court of Appeals' blind acceptance of the no longer applicable *Sanders'* "ends of justice" language, we urge the Court to do away with all of the confusion and speculation, and breathe life into the manifest congressional purpose of bringing a "greater degree of finality of judgment" and a meaningful, "qualified application of the doctrine of res judicata" to the manner by which the federal judiciary must evaluate successive, identical claims being brought by state prisoners. To do this, the Court should expressly disavow the outmoded and all-too-vague *Sanders'* analysis, and formulate a more practical, better defined set of guidelines, founded on section 2244(b), which will treat even-handedly the rights of all parties to federal habeas litigation, and serve, as well, the compelling societal and judicial interests involved.

2. Unencumbered by the now inapplicable and statutorily unjustified test for dealing with successive, identical claims set forth in the dictum of *Sanders* v. *United States,* 373 U.S. 15-17, the Court should disregard that questionable precedent and forge a new, more definite rule, fair to all the parties in habeas litigation, which would effectuate the express congressional purposes underlying the enactment of section 2244(b), and would better serve the important societal and governmental concerns which attend the unique federal-state relationship created by habeas corpus. We submit that the fairest and most practical rule is one that would apply a qualified, but generally firm, doctrine of issue preclusion, analogous to the concept of collateral estoppel,* to successive habeas petitions filed by state pris-

* *See, generally, Migra* v. *Warren City School Dist. Bd. of Education,* 465 U.S. 75, 104 S.Ct. 892, 894 n.1 (1984); *United States* v. *Mendoza,* 464 U.S. 154, 104 S.Ct. 568, 571 N.3 (1984); *Allen* v. *McCurry,* 449 U.S. 90, 94-98, n.5, 12 (1980).

The State's argument should not be misread as suggesting that this proposed doctrine of issue preclusion would serve as a bar to obtaining federal habeas review following a merits determination by the state courts. *See Allen* v. *McCurry,* 449 U.S. at 98, n.12; *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973); *cf. Stone* v. *Powell,* 428 U.S. 465 (1976).

oners raising claims identical to those previously determined and rejected on the merits in an earlier federal habeas proceeding. The general rule we seek is one providing that after a state prisoner has had one full and fair opportunity to litigate the merits of a constitutional claim before the federal judiciary, a subsequent petition by him raising the identical claim should be subject to a requirement of mandatory, summary dismissal. *Cf. Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976) (where state prisoner has had full and fair opportunity to litigate merits of Fourth Amendment claim in the state courts, he may not be heard at all on habeas corpus).

However, recognizing that the "need not entertain" language of section 2244(b) is suggestive of a residual, discretionary power in the federal courts to reconsider an identical claim, we contend that the general rule should be qualified by exceptions to presumptive finality when warranted by extraordinary situations, such as when the petitioner presents newly discovered and previously unavailable favorable facts which would have an outcome determinative effect on the earlier habeas proceeding,* or when there has been an intervening, significant change in the law which the prisoner can demonstrate would be accorded retroactive, collateral application if he were, instead, bringing his petition for habeas relief on for the first time.**

* This exception, predicated upon a simple notion of basic fairness, is consistent with the long-established rules that even a jury verdict, once rendered, may be reopened and set aside on the grounds of newly discovered evidence. *See, e.g.*, F. R. Crim. P. 33; New York Criminal Procedure Law § 330.30 (3), 440.10(1)(g) (McKinney 1984).

** *Sanders* provided that an "intervening change in the law" would warrant a reconsideration of a previously rejected issue to serve "the ends of justice." 373 U.S. at 17. We believe, however, that it is fair to allow a reconsideration of a legal issue based on a substantial change in the law only when that new rule would be retroactively applicable on collateral habeas attack in the first instance, a likelihood that is by no means assured. *See Solem* v. *Stumes*, 465 U.S. 638, 104 S. Ct. 1338, 1345-46 (1984). It would be absurd to place the state prisoner who files a successive writ in a better situation than a first-time habeas petitioner, who would receive absolutely no benefit from a non-retroactive, new rule of law.

This rule would strike a reasonable and just balance between the reverence that must be paid to the "Great Writ" (*see Stone* v. *Powell*, 428 U.S. at 1475, n.6), and the very real need to bring a certain termination, at some point, to habeas litigation challenging the validity of a state-court conviction. Under this rule, there is no danger that a state prisoner whose liberty is at issue will be denied the chance to have the federal courts give plenary consideration to a properly cognizable constitutional claim.* *See Fay* v. *Noia*, 372 U.S. 391, 424 (1963); *Price* v. *Johnston*, 334 U.S. 266, 291 (1948). At the same time, the manifest irrationality of treating federal habeas as an ever-turning merry-go-round, perpetually holding out to the prisoner the possibility of a lucky snatch of the elusive brass ring, would, justifiably, come to an end.

The pressing need for greater finality in habeas corpus litigation has been recognized not only by Congress, when it stepped away from *Sanders* by enacting section 2244(b), but also by the members of this Court, who, on a number of recent occasions, have pointed out the deleterious effect that lack of finality has on federal-state relations, and on our system of justice. *See, e.g., Engle* v. *Isaac*, 456 U.S. 107, 126-128 (1981); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263-265 (1973); *Sanders* v. *United States*, 373 U.S. at 24-25 (Harlan, J., dissenting); *see also*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). Congress focused, at the time it enacted section 2244(b), on the heavy burden being placed on limited federal judicial resources. U.S. Code Cong. & Ad. News, 3663-64 (1966). In view of the further, huge increase in federal habeas litigation since those concerns were addressed by Congress, the problem, undoubtedly, must be recognized as one of major proportion today. *See*, p. 19, n.†. But, while the strain on scant judicial resources

* Of course, if the prisoner attempts to manipulate the system of criminal justice by improperly withholding a claim from an earlier petition, he may lose the right of subsequent review of a newly raised claim under traditional "abuse of the writ" principles which are unrelated to the case at hand.

may be substantial, the strain placed on federal-state relations, is worse. As the Court's members have recognized, principles of habeas finality are integrally related to the constant friction that exists between the state and federal judicial systems:

> "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

Engle v. *Isaac,* 456 U.S. at 128.

Another "significant cost" exacted by the writ that also serves to detract from federal-state comity is that "the writ degrades the prominence of the [state] trial itself." *Engle* v. *Isaac,* 456 at 127; *see Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977). Although the Court has emphasized that the state trial should be viewed as the "main event" (*Wainwright* v. *Sykes,* 443 U.S. at 90; *Barefoot* v. *Estelle,* 463 U.S. 880, 77 L.Ed.2d 1090, 1100 [1983]), repetitive resort to federal habeas, of the type illustrated by the tortuous procedural history of the instant case, frequently reduces the state trial to a seemingly inconsequential preliminary bout heading a full card of knock-down, drag-out legal fights in the federal courts.

Federal-state relations undergo a further, severe strain stemming from the "miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense." *Hankerson* v. *North Carolina,* 432 U.S. 233, 247 (1977); *see Engle* v. *Isaac,* 456 U.S. at 127-128. In the present case, Wilson's guilt of murdering Sam Reiner in 1970 was established to a certainty not only by his admissions to Benny Lee, but also by the independent, overwhelming circumstantial evidence of his guilt. But, obviously, there is only a minute likelihood of conviction if the case were to be retried in

1985. Indeed, it is highly doubtful that any of the State's eyewitnesses might ever be located. For the people of New York State, the probable result of such a retrial could only serve to stoke the fires of federal-state conflict.

The discretionary, "controlling weight" doctrine, as articulated in *Sanders* v. *United States,* 373 U.S. at 15, could do little to bring real finality to habeas litigation. It matters not that, even under *Sanders,* the federal courts rarely granted relief on a petition raising a successive identical claim, because it is the potential for a discretionary grant of relief which shines as a beacon for state prisoners who will forum shop with their constitutional claim in the hope that the "right" sympathetic District Judge or Court of Appeals panel will be found. *See, e.g., United States ex rel. Williams* v. *McMann,* 430 F.2d 1284-85 (2d Cir. 1970). Worse, the term "ends of justice" is so vague and difficult to define that, as shown by the instant case, it invites a judge or court to grant habeas relief on a successive, identical claim based merely upon a simple disagreement with the legal analysis used in the previous case.*

In contradistinction to the loosely defined *Sanders'* guidelines, the rule advocated by the State in this case would promote and support these societally important principles of finality, comity, federalism, and basic justice.** The inherent tensions in federal-state relations would be somewhat relaxed, and the "costs" exacted by habeas corpus would be reduced. Most importantly, this could be accomplished fairly, without any true diminution of state prisoners' rights. As previously noted, even under *Sanders* a successive identical claim was most likely not to

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* Even the "plain error" test employed by some of the Circuits adhering to *Sanders'* "ends of justice" approach (*see Bass* v. *Wainwright,* 675 F.2d 1204, 1207 [11th Cir. 1982]; *Cancino* v. *Craven,* 467 F.2d 1243, 1246 [9th Cir. 1972]), offers little objective guidance and allows a court to issue the writ where it merely has some disagreement with the legal ruling reached by the earlier federal court.

** The rule would also have the important side effect of promoting consistency within the federal court system. *See Allen* v. *McCurry,* 449 U.S. at 94.

meet with any success, so for the overwhelming majority of prisoners the newly proposed rule of issue preclusion would deprive them of nothing, in real terms. Presumably, however, the rule would have the salutary effect of dissuading many of them from bringing successive claims that would now be, more obviously, futile.

Furthermore, any concern that this new rule would treat state prisoners less fairly than federal prisoners, whose successive claims are still governed by the "ends of justice" language of section 2244(a) and *Sanders*, is illusory in nature. For it has to be remembered that a section 2255 motion must ordinarily be made before the federal district judge who presided over the trial; this requirement is enforced by Rule 4(a) of the rules governing section 2255 proceedings. 28 U.S.C. foll. § 2255, Rule 4(a). Furthermore, any appeal from that judge's order will proceed to the Circuit Court of Appeals that, in most instances, will have previously affirmed the federal judgment of conviction, rendering highly unlikely the possibility of success. *See Developments in the Law—Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1064, 1066 (1970) ("It is the uniform practice of the lower federal courts to refuse to hear in section 2255 proceedings questions previously considered on appeal .... Even if the decision were reversed by the district court, it is hard to imagine the Court of Appeals also reversing its own prior determination of the identical claim"). Hence, in practice, even under the proposed rule of qualified issue preclusion, the state prisoner whose constitutional claim is heard by the lower and appellate courts of both the state and federal systems would be more likely to find a judge or court receptive to his constitutional contention because the federal prisoner's more liberal access to the courts on a section 2255 motion containing a successive, identical claim is offset by the general requirement that the same trial judge entertain each of those motions.

Finally, the pronouncement of this rule of issue preclusion would not conflict, other than superficially, with the traditional assumption that principles of *res judicata* were

not applicable to habeas corpus. The simple answer is that, as already made clear, Congress amended section 2244 for the express purpose of introducing "qualified principles of *res judicata*" into habeas corpus, in derogation of the common law precedents and § 2244 as originally enacted. *See* p. 17, n., *supra*. Moreover, older judicial statements of this Court excluding *res judicata* analysis from habeas corpus were often directed at situations considering the *res judicata* effect of state judgments (*see, e.g. Preiser* v. *Rodriguez,* 411 U.S. at 497; *Brown* v. *Allen,* 344 U.S. 443, 458 [1953]), or situations where the Court was considering the *res judicata* effect of a denial of an earlier habeas petition on a later petition raising a new, previously unheard, claim. *See, e.g., Price* v. *Johnston,* 334 U.S. at 287-293. Patently, these aspects of habeas *res judicata* analysis are unrelated to and unaffected by the narrower rule of qualified issue preclusion that we urge in this case.

While it is true that in *Salinger* v. *Loisel,* 265 U.S. 224, 230 (1924), the Court announced that *res judicata* did not apply in a case where a federal prisoner was bringing successive, identical habeas claims to prevent extradition, that case is of limited application here because in *Salinger* principles of comity and federalism did not come into play, and the habeas petitions were not being used to relitigate an entire state-court trial. In any event, nothing in *Salinger* prohibits a qualified rule of issue preclusion if Congress authorized it by statutory enactment.

In the end, therefore, the rule of issue preclusion which we propose should be accepted as a reasonable middle-ground, serving to effectuate the intent of Congress to bring a greater degree of finality to habeas litigation, while preserving a state prisoner's full and fair opportunity to have his constitutional claims entertained in plenary fashion, on the merits, by the federal judiciary.

3. Applying this qualified rule of issue preclusion to the circumstances of the present case, it is evident that the most recent Court of Appeals panel exceeded its proper authority when it entertained the merits of Wilson's second

habeas petition, and then granted him complete relief. Unquestionably, the Sixth Amendment *Massiah* claim relating to the incriminating admissions he made to Benny Lee was identical to the claim raised and rejected on the merits on the first petition, despite the new, additional arguments concerning this Court's intervening decision in *United States* v. *Henry,* 447 U.S. 264. *See Sanders* v. *United States,* 373 U.S. at 16. And, nowhere in the second petition did Wilson allege any new, favorable material facts which might have raised a doubt about the accuracy of the original factual and legal determinations.

Wilson did, however, argue that the intervening *Henry* decision created a new rule of law, which should be applied retroactively.* But, this contention was completely rejected by the Court of Appeals (Pet. App. A, pp. 12a-14a). Hence, by the Court of Appeals' own analysis, any justification for a reconsideration of the constitutional claim would be eliminated under the new, qualified rule of issue preclusion.

Moreover, the Court of Appeals' holding that *Henry* did not create new law, but "merely applied the 'deliberately elicited' test of *Massiah* to new facts," was correct, as the majority of this Court, in *Henry,* made clear when it stated that the issue presented there was "whether under the facts of this case, a government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah.*" 447 U.S. at 270. A review of Wilson's opposition to the State's petition for certiorari (pp. 18-19), suggests that he, too, now recognizes that *Henry* did not create a new rule of constitutional law.

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* In the memorandum of law in support of the second petition, Wilson's counsel argued:

> "The only issue before the Court is whether Wilson should have the benefit of the Supreme Court's decision in *Henry.* That decision established a right to counsel under a new set of circumstances that are present here. Furthermore, all relevant considerations militate for the retroactive application of the new rule to Wilson.
>
> First, *Henry* changed the law . . . ." (JA. 145)

Yet even if *Henry* did create a new rule of law during the intervening period between Wilson's first and second habeas petitions, the outcome of the present analysis would be no different. For in light of this Court's decision in *Solem* v. *Stumes,* 465 U.S. 638, 104 S.Ct. 1338, 1342-45 (1984), where the Court refused to apply the new Sixth Amendment rule of *Edwards* v. *Arizona,* 451 U.S. 477 (1981), retroactively in a collateral, habeas attack on Stumes' conviction, it seems rather certain that Wilson would not be able to demonstrate that *Henry* would be applied retroactively even if it did create a new Sixth Amendment rule. Accordingly, since it would be manifestly unfair to accord Wilson a broader right of judicial consideration than the first-time habeas petitioner, his successive, identical claim should be subject to mandatory, summary dismissal.

B. At the very least, issue preclusive effect must be accorded to the factual determinations previously made by the federal courts.

Wilson's statements to Benny Lee were found by the state trial court, as a matter of fact, to be "spontaneous" and "unsolicited" (JA. 63). The federal courts that considered the case prior to the recent Court of Appeals panel properly accepted the correctness of those factual determinations (*see* 28 U.S.C. 2254(d)]; *Sockwell* v. *Blackburn,* 748 F.2d 979, 981 [5th Cir. 1984], *cert. denied,* —— U.S. ——, 105 S. Ct. 2049 [1985]) and reconfirmed that the statements were "spontaneous" (Pet. App. C, 28a; Pet. App. D, 32a) and "completely unsolicited" (Pet. App. E, 41a). Based on those factual determinations of spontaneity, a violation of *Massiah,* even as applied by *Henry,* could never be found. *See United States* v. *Henry,* 447 U.S. at 276 (Powell, J., concurring), cited with approval in *Snead* v. *Stringer,* 454 U.S. 988, 993 (1981) (Burger, C.J., Rehnquist, and O'Connor, JJ., dissenting from denial of certiorari).

Because Wilson had had a full and fair opportunity to litigate that factual issue of spontaneity in the state and

federal courts, the recent Court of Appeals' panel should have been summarily precluded from reconsidering those settled factual matters and reaching the contrary, faulty conclusion (*see* Point II, pp. 39-42) that the statements were other than spontaneous. Even if this Court were not to accept the argument proffered above that it should promulgate a qualified, but generally firm, rule of issue preclusion applicable to the reconsideration of successive, identical legal claims, at the very least it should insist that even in habeas corpus litigation, purely factual determinations mad. in an earlier habeas action between the parties, particularly when those determinations have been made or adhered to by a court of coordinate jurisdiction, must be accorded the issue preclusive effect warranted by ordinary principles of collateral estoppel. It may be that when a man's liberty is at stake, a successive reconsideration of legal decisions, previously made on the merits, must be tolerated, but there is no common sense in allowing perfectly good factual determinations made by earlier federal courts to fall by the wayside merely because a new Court has taken jurisdiction of the case. The law can change, but once-found historic facts never do. The most recent panel of the Court of Appeals was wholly unjustified in substituting its own factual determinations for those of the earlier federal courts, as it had no monopoly on the ability to find the "truth."

The Court, therefore, should take this opportunity to undo the potential for such an irrational result by generally requiring the lower federal courts to defer not only to the factual findings of state courts (28 U.S.C. § 2254[d]), but also to the factual determinations of other courts within the federal system, once the habeas litigant has had one full and fair opportunity to debate those facts in an earlier federal proceeding.

C. Even under an "ends of justice" analysis, a federal court should be without discretion to entertain a successive, identical claim by a state prisoner which has been previously considered on the merits and rejected by the federal judiciary, absent the presentation of material new facts or an intervening change in the law which is to be applied retroactively on collateral review.

Were this Court to rule that a discretionary "ends of justice" exception to presumptive finality must be factored into habeas litigation involving the consideration of successive identical claims under section 2244(b), because of the less-than-mandatory "need not entertain" language of that section, the Court should nevertheless declare that a proper interpretation of that amorphous term demands the conclusion that a federal court would be without such discretion to reconsider when there has been a full, previous merits review of the issue, and no new, material facts or new, retroactive rule of law has been presented by the subsequent petition. For, any current application of the term "ends of justice" must be undertaken with an eye toward, and in the context of, the express purpose of bringing a "greater degree of finality" and a "qualified application of the doctrine of res judicata" to habeas litigation which Congress sought to achieve when it enacted section 2244(b). To serve that congressional intent, "ends of justice" would have to be a more understandable and objective standard than that which was loosely articulated by the Court in *Sanders* v. *United States*, 373 U.S. at 16-17, 18-19.

The *Sanders* approach to discretionary, "ends of justice" reconsideration, as the present case demonstrates, does violence to any meaningful notion of habeas finality. Under *Sanders*, federal courts are left, ultimately, to their own devices for deciding whether to entertain a successive, identical claim, and nothing more than simple disagreement with a previously announced decision may be used as a license to conduct a plenary review of the repeated claim. The serious, negative impact that this could have on federal-

state relations has already been recognized by some of the federal Courts of Appeal, which have, on previous occasions, applied a finality rule of the type the State advocates here.*

We believe that the "ends of justice" do not allow for the concept that the finality of fifteen years of state and federal litigation may, in the end, be reduced to a dependency upon an uncircumscribed exercise of judicial discretion, perhaps guided by nothing more than an arbitrary disagreement that one federal court may have with the constitutional analysis of another court of coordinate jurisdiction. Inapporpriate exercises of judicial discretion of the type which occurred in the instant case may be prevented by a reasonable rule, of the sort we urge, which requires that something more substantial than simple disagreement serve as the basis for undoing the finality of a merits determination made by another federal court.

Moreover, any rule requiring that objective criteria serve as the guidelines for determining whether there should be a reconsideration of a successive identical claim will be meaningful only if courts are not permitted to rely on "boilerplate" language to satisfy that rule. Rather, there should be an insistence that before a court may invoke the "ends of justice" to allow it to entertain a previously heard claim, it must articulate the objective grounds that warrant resort to the exercise of an extraordinary, discretionary right of reconsideration. Not only would this aid the lower courts in assuring that they would be exercising this discretion soundly, but it would also provide necessary

* Ironically, that approach was first employed by a panel of the Court of Appeals for the Second Circuit, in *United States ex rel. Schnitzler* v. *Follette,* 406 F.2d 319 (2d Cir. 1969), which overturned a district court's discretionary decision, based on the "ends of justice," to reconsider an issue previously entertained on the merits by an earlier district court and panel of the Court of Appeals. It was held that the district court had no discretion to reconsider the identical claim. 406 F.2d at 332; *accord: United States ex rel. Townsend* v. *Twomey,* 452 F.2d 350, 353-355 (7th Cir. 1971), *cert. denied,* 409 U.S. 854 (1972); *and see Walker* v. *Lockhart,* 726 F.2d 1238, 1248 (8th Cir.), *cert. dismissed,* —— U.S. ——, 105 S.Ct. 17 (1984).

insight to an appellate court which might later review that exercise of discretion. *Cf. Sumner* v. *Mata,* 449 U.S. 539, 551-552 (1981)

POINT TWO

In view of the presumptively correct state court finding that Wilson's inculpatory jailhouse statement to an undisclosed government agent was spontaneous and unsolicited, the statement was not "deliberately elicited" in violation of the Sixth Amendment right to counsel.

Prior to Wilson's trial, a state court conducted a hearing to determine the admissibility of statements made by Wilson to his cellmate, Benny Lee. The hearing court credited the uncontradicted testimony of the state's witnesses and found the following facts: (1) that Lee was instructed to ask no questions, but only to listen to what Wilson said in his presence; (2) that Lee followed those instructions; and (3) that the statements Wilson made to Lee were spontaneous, unsolicited, and voluntary (JA. 62-63). The recent two-judge majority of the Court of Appeals, however, unlike the two district judges and the prior Second Circuit panel majority that had previously considered Wilson's case, completely disregarded those findings, as well as significant portions of the record that supports them. Instead, it relied on its own factual findings, which, in addition to being "considerably at odds" with the state court's findings [*see Sumner* v. *Mata,* 449 U.S. 539, 543 (1981)], are, in critical respects, without foundation in the record. If proper deference is given to the state court's findings and to the record underlying them, however, the statements made by Wilson in Lee's presence can not be deemed "deliberately elicited" within the meaning of *United States* v. *Henry,* 447 U.S. 264 (1980), and *Massiah* v. *United States,* 377 U.S. 201 (1964). Thus, assuming that the court below could properly reconsider the claim raised on Wilson's successive habeas corpus petition [*see* Point One, *supra*] and that *Henry* should be applied retroactively

in a habeas corpus proceeding,* this Court should conclude that the Court of Appeals erred in its determination that Wilson's constitutional right to counsel was violated by the use at trial of his inculpatory statements.

A. The state court's findings are entitled to deference pursuant to 28 U.S.C. § 2254(d).

The power of a federal habeas corpus court to determine factual issues is expressly limited by 28 U.S.C. § 2254(d), which provides that, where there has been a state court finding of fact following a hearing, that finding must be presumed to be correct unless one of eight enumerated exceptions applies. As this Court has recognized, that statute serves both to minimize the inevitable friction between the federal and state courts that is generated by habeas corpus proceedings [*Sumner* v. *Mata*, 449 U.S. at 550 (1981)] and to insure "that there will at some point be the certainly that comes with an end to litigation . . ." *Id.*, n.3, quoting *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). To lend weight to the congressional mandate and to its salutary purposes, this

* The Court of Appeals obviated the question of *Henry's* retroactivity by agreeing with the State's position that *Henry* did not create a new rule, but merely applied settled precedent to a different factual situation (Pet. App. A, pp. 11a-14a). Although Wilson's petition for a writ of habeas corpus was expressly premised on the theory that *Henry* changed the law, he has apparently abandoned that theory. *See* Brief in opposition to petition for a writ of certiorari, pp. 18-19). If Wilson's original contention were valid, however, the "new" rule of *Henry* would fail to satisfy the criteria by which this Court determines whether retroactive effect is appropriate: The Sixth Amendment issue with which *Henry* was concerned does not bear upon the reliability of trial evidence or the truthfinding function of a trial; the "prior" rule of law was relied on extensively, not only by law enforcement authorities, but by the state and federal courts; and investigation into claims of similar violations would severely disrupt the administration of justice by reopening countless final judgments. *See Solem* v. *Stumes*, 465 U.S. 638 (1984) (New Sixth Amendment rule forbidding further interrogation after invocation of right to counsel does not meet any of the three criteria for retroactivity and is therefore not applicable in habeas corpus proceeding). Therefore, if the holding of *Henry* could be deemed a "new" rule, it clearly should not be applied retroactively on collateral review of a final conviction.

Court has held that a federal court may not dispense with the presumption of correctness without explaining the reasoning that led it to conclude that one of the enumerated exceptions is applicable. *Id.* at 551. Moreover, this Court has held that the "high measure of deference" to which state court findings are entitled requires that they be treated as dispositive unless they lack even "fair support" in the record and there is "convincing evidence" to the contrary. *Wainwright* v. *Witt*, —— U.S. ——, ——, 105 S. Ct. 844, 856 (1985); *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) *Marshall* v. *Lonberger*, 459 U.S. 422, 432 (1983).

The "issues of fact" to which the presumption applies are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" *Townsend* v. *Sain*, 372 U.S. 293, 309, n.6 (1963), quoting *Brown* v. *Allen*, 344 U.S. 443, 506 (1953); *see Cuyler* v. *Sullivan*, 446 U.S. 335, 341-42 (1980) (applying the quoted language to the subsequently enacted habeas corpus statute). Although the constitutional issue raised by a habeas petitioner may entail a mixed question of law and fact, "the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption . . . ." *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (emphasis in original). Thus, a federal court, in assessing a constitutional claim according to appropriate legal standards, must respect the state court's findings of historical facts ". . . and the inferences fairly deducible from these facts." *Marshall* v. *Lonberger*, 459 U.S. at 435.

Clearly, in the present case, the determination of the state court that Wilson's statements were unsolicited and spontaneous is a finding of historical fact to which the federal courts were bound to defer.* *See Sockwell* v. *Black-*

* In an attempt to classify the finding of spontaneity as a legal conclusion, Wilson has argued that the state court found only one fact—that Lee did not interrogate Wilson—and that, "[o]n the basis of this finding, it concluded that Wilson's statements were 'spontaneous' and 'voluntary'" (Brief in opposition to petition for a writ of certiorari,

(footnote continued on next page)

burn, 748 F.2d 979, 981 (5th Cir. 1984),*cert. denied,* —— U.S. ——, 105 S. Ct. 2049 (1985) (state court's finding that statement was spontaneous accorded statutory presumption of correctness). *See also People* v. *Harrell,* 59 N.Y.2d 620, 463 N.Y.S.2d 185, 449 N.E.2d 1263 (1983); *People* v. *Ellis,* 58 N.Y.2d 748, 459 N.Y.S.2d 32, 445 N.E.2d 208 (1982) (lower courts' finding that statements were spontaneous treated as factual conclusions, reviewable by New York Court of Appeals only if unsupported by record). The determination that Wilson's utterances were spontaneous and unsolicited did not entail application of a legal standard, but rested solely on the hearing court's assessment of the credibility of the state's witnesses at the hearing and the import of their testimony. *Cf. Marshall* v. *Lonberger,* 459 U.S. at 436-37 (federal court must apply legal standard to facts to determine if plea was "voluntary" in the constitutional sense); *but see Maggio* v. *Fulford,* 462 U.S. 111, *reh. denied,* 463 U.S. 1236 (1983) (competence to stand trial is a factual issue regarding which federal court must defer to state court's findings). As District Judge Gagliardi recognized, the state court's finding that Wilson's statements were "spontaneous" was fully supported by the hearing record, which "established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother" (Pet. App. C, p. 28). By completely disregarding those facts, the Court of Appeals circumvented the statutory mandate, which requires "the federal courts to face

p. 21). The hearing court's decision, however, makes it clear that it did not deem Wilson's statement spontaneous *because* there was no interrogation, as Wilson's argument suggests, but, rather, that it found "the fact that the defendant's utterances in Lee's presence were spontaneous *and* not as a result of any interrogation by Lee" (JA. 63) (emphasis added).

up to any disagreement as to the facts and to defer to the state court unless one of the factors listed in § 2254(d) is found." *Sumner* v. *Mata,* 455 U.S. 597-98.*

B. The Court of Appeals disregarded conflicting state court findings and relied upon "facts" not supported by the record.

The Court of Appeals supported its conclusion that Wilson's statements were "the product of" his conversations with Lee by offering the following rendition of the facts:

> Here, after Lee was summoned by Detective Cullen, he was shown a picture of Wilson. Lee asked whether he could do anything to help with the case. After agreeing to cooperate, Lee was told that Wilson was soon going to be arrested and placed in Lee's cell. He was directed to find out as much information from Wilson as he could without asking questions. The fact that the government moved Wilson into a cell overlooking the Star Taxicab Garage—the scene of the crime—achieved the desired effect. As soon as Wilson arrived and viewed the garage, he became upset and stated that "someone's messing with me." The catalytic effect of being placed into this "room with a view" thus gave rise to expressed uneasiness on Wilson's part. Even accepting that Lee did not ask Wilson any direct questions, he effectively deflated Wilson's exculpatory version of his connection to the robbery scene by remarking that the story did not "sound too good" and that he had better come up with a better one. Subtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind. Lee testified that after several days and nights together,

* Although, in some instances, it might be appropriate for this Court to remand a case to permit the Court of Appeals to explain why it deemed one of the enumerated exceptions applicable, no useful purpose would be served by such a procedure in this case, because the record clearly supports the state court's findings (*See* Point Two, section B, *infra*), and none of the other exceptions are pertinent to the circumstances of this case.

> Wilson's version of the events surrounding the robbery changed "in bits and pieces." During this same time, Lee furtively made notes of his conversations with Wilson, which he later handed over to the police. (Pet. App. A, pp. 9a-10a).

As closer analysis will reveal, the Court of Appeals could only have arrived at this version of the facts by disregarding the state court's findings, as well as key parts of the record underlying them, and by relying on "facts" that are not supported by the record.

"[*Lee*] *was directed to find out as much information from Wilson as he could without asking questions.*" There is no support in the record for the finding that Lee was asked to find out "as much information from Wilson as he could." On the contrary, both Lee and Detective Cullen testified that Lee was asked to listen to Wilson only for the purpose of learning the names of his two unapprehended accomplices (JA. 24, 37).

"*The fact that the government moved Wilson into a cell overlooking the Star Taxicab Garage—the scene of the crime—achieved the desired effect.*" No evidence in the record even remotely supports the inference that the effect the view of the Star Garage would have on Wilson was anticipated, much less "desired," by the police; certainly, the state court made no such finding. The record does, however, indicate that Lee had been moved to the cell with a view of the garage approximately two weeks prior to Wilson's arrival (JA. 37), which means that he was there long before the robbery and murder occurred. While it is, of course, possible that Lee was chosen specifically because of the location of his cell, speculation that Detective Cullen was motivated by that circumstance would require attributing to him a far more sophisticated degree of psychological cunning than anything in the record serves to suggest. *See Rhode Island* v. *Innis,* 446 U.S. 291, 302 (1980) (there was nothing in the record to suggest that the police were aware that the defendant was particularly susceptible to an appeal to his conscience); *cf. Brewer* v. *Williams,* 430

U.S. 387 (1977) (detective's delivery of "Christian burial speech" was, by his own concession, a psychological ploy calculated to induce an incriminating statement from the defendant). It is far more plausible that the location of Lee's cell, like the fact that the crime was committed in close proximity to the Bronx House of Detention, was purely coincidental. Moreover, the only "effect" the move to the cell overlooking the garage achieved was to prompt an exculpatory statement, which was substantially the same as the one Wilson had already made to Detective Cullen.

"[*Lee*] *effectively deflated Wilson's exculpatory version of his connection to the robbery scene.*" The Court of Appeals failed to note that, notwithstanding Lee's remark that the story did not "sound too good," Wilson "stuck to the story" (JA. 39). Thus, it can hardly be said that Lee's comment "effectively" deflated Wilson's original account of his actions at the time of the crime.*

"*Subtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind.*" Whereas the record lacks any evidence that Lee employed a "subtle" verbal technique to wear away at Wilson's resolve to deny his guilt, or that his verbal intercourse with Wilson was "ongoing", it contains an uncontradicted depiction of the specific incident that exacerbated Wilson's mental state: a visit

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* Lee's remark that Wilson "had better come up with a better" story appears only in his trial testimony (JA. 81). Thus, in referring to that remark, the Second Circuit was relying on evidence which was not considered by the hearing court in connection with its decision on Wilson's suppression motion and, consequently, under New York law, could not be considered by appellate courts with regard to the suppression issue. *People* v. *Gonzalez,* 55 N.Y.2d 720, 447 N.Y.S.2d 145, 431 N.E.2d 630 (1981), *cert. denied,* 456 U.S. 1010 (1982) It should be noted that Wilson never moved to reargue the suppression motion based on evidence subsequently adduced at trial. Thus, the facts that emerged at trial were never "fairly presented" to the state courts with regard to the claim that Wilson's statements were unconstitutionally obtained and, therefore, under the doctrine of exhaustion of state remedies, should not have been considered by a federal court in connection with that issue. *Picard* v. *Connor,* 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b) and (c).

from his brother in which he learned that his family held him at fault for the murder of Sam Reiner (JA. 41-42). Remarkably, the Court of Appeals ignored this crucial incident, notwithstanding the significance attached to it by the District Court, and determined, with no apparent basis, that it was Lee's conversations with Wilson that caused him to become upset and eventually to admit his guilt. In doing so, the Court of Appeals also blinked at the state court's determination that Wilson's utterances were spontaneous.

Thus, it was the Court of Appeals that subtly and slowly, but surely, caused the details of the case before it to change in bits and pieces. Whereas the hearing record, and the state court findings arising from it, reflect that Detective Cullen enlisted the aid of Benny Lee for the purpose of learning, without active efforts, the identities of two unapprehended murderers and that Lee heard an incriminating statement prompted by Wilson's spontaneous response to his own family's rebuke, the Court of Appeals based its opinion on a scenario in which a detective slyly plotted to jar a confession from a defendant's mouth through a calculated stratagem by which he exposed the defendant to the scene of his crime—knowing this would strike a resonant chord in his psyche—and then subjected him to a relentless verbal assault by an informant who was directed to extract as much information as possible by any technique that did not involve asking questions. Clearly, the version of the "facts" relied upon by the Court of Appeals can not be reconciled with either the record or the state court's findings; it thus represents a flight of fancy far beyond the limits imposed by 28 U.S.C. § 2254(d). When the facts of this case are returned to the solid ground of the record and are held within the boundaries imposed by the presumptively correct state court findings, it will be seen that they do not justify the Court of Appeals' conclusion that Wilson's case is indistinguishable from *Henry*.

C. The facts of the present case are distinguishable from those of *United States* v. *Henry* and do not establish that the state "deliberately elicited" the incriminating statements used against Wilson at trial.

In *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), this Court held that "the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at trial evidence of his own incriminating words, which federal agents deliberately elicited from him after he had been indicted and in the absence of counsel." The question before this Court in *United States* v. *Henry*, 447 U.S. 264, 270 (1980), which concerned a defendant's statements to a fellow inmate who was working as an undisclosed government informant, was "whether under the facts of this case, a Government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*." In its analysis, the Court pointed to three significant factors:

> First, Nichols [the fellow inmate] was acting under instructions as a paid informant for the government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

Id. at 270. The Court found, in the absence of evidence regarding the specific nature of the conversation from which the incriminating statements emerged, that this combination of circumstances supported the inference that "Nichols deliberately used his position to secure incriminating information from Henry . . . ." *Id.* at 270-71.

In *Henry*, it was necessary to resort to such inferential reasoning because the record, consisting almost exclusively of an affidavit by the detective who had instructed Nichols [*Id.* at 268], did not disclose the specific circumstances that provoked Henry's incriminating remarks. Justice Powell "view[ed] this as a close and difficult case because no evidentiary hearing has been held on the *Massiah* claim." [*Id.* at 277 (Powell, J., concurring)] and Justice Blackmun

observed that, because of the "scant record," "we know only that Nichols and Henry had conversations . . . . We know nothing about the nature of these conversations . . . ." *Id.* at 287-88 (Blackmun, J., dissenting). The limitations posed by the record were similarly recognized in the lower court, where Circuit Judge Butzner noted that "[i]t would have been prudent for the district court to have conducted an evidentiary hearing to dispel the ambiguity of the documentary evidence, particularly since the government did not reveal the substance of its paid informant's conversation" and concluded that "*absent testimony by the informant about what he said to the defendant,* the judgment must be reversed . . . ." *Henry* v. *United States,* 590 F.2d 544, 548 (4th Cir. 1978) (Butzner, C.J., concurring) (emphasis added).

The present record does not suffer from any such limitation. Here, the evidence adduced at the pre-trial evidentiary hearing clearly established that Wilson's impulse to talk about the crime was not stimulated by his cellmate, but, rather, that:

> . . . he [Wilson] was upset over the fact that his brother had come and said that his family was saying that he had killed Sam and why did he kill Sam and this upset him very much and that would start him talking about different things, about the crime and different things [JA. 42].

Thus, in contrast to *Henry,* the facts of this case do not warrant the conclusion that the informant used his position to elicit statements; rather, the evidence makes it clear that Lee merely listened passively while Wilson, prompted by his brother's disturbing remarks, and perhaps by a guilt-ridden conscience, described his role in the murder of Sam Reiner.

That distinction is crucial, for the holding in *Henry* plainly turned on the determination that Henry's incriminating statements were the "product" of his conversations with Nichols. *Id.* at 271. The Court emphasized that "the incriminating conversations between Henry and

Nichols were facilitated by Nichols' conduct . . . ." *Id.* at 274. As Justice Blackmun noted, "[a]ll members of this Court agree that Henry's statements were properly admitted if Nichols did not 'prompt' him." *Id.* at 287 (Blackmun, J., dissenting). Moreover, Justice Powell recognized that "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." *Id.* at 276 (Powell, J., concurring). Here, any effect that Lee's conversation may have had on Wilson was attenuated from the incriminating statements, which were the products of an intervening and independent stimulus.

An additional factual distinction between this case and *Henry* lies in the nature of Lee's relationship to the state. In *Henry,* the fact that "Nichols was acting under instructions as a *paid* informant for the Government", [*Id.* at 270 (emphasis added)], was foremost among the factors that the Court deemed important. The Court found it especially significant that, under the terms of his arrangement with the government, Nichols was to be paid only if he produced useful information. *Id.* Lee, on the other hand, had entered into no deal with the state and had received no promise of compensation or leniency for his services (JA. 43, 45-46). Thus, one of the most compelling factors underlying the decision in *Henry* is absent in the present case.

In *Henry,* the informant was given mixed messages: while he was told not to ask questions, he was also made aware that he would be paid only if he discovered useful information. Thus, the contingent-fee arrangement effectively undermined and countermanded the instruction not to inquire and led this Court to conclude that "[e]ven if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Id.* at 271. That conclusion, in turn, supported the Court's determination that the government had "intentionally creat[ed] a situation that was likely to induce Henry to make incriminating statements without the assistance of counsel . . . ." *Id.* at 274.

No such conclusion is warranted in the absence of a contingent-fee arrangement. Even granting that—notwithstanding that he had received no promises—Lee may have hoped that his cooperation would inure to his benefit, such a hope surely would not motivate him to defy the express instructions of Detective Cullen. Unlike *Henry,* in the present case, there was no understanding between the informant and the detective that would conflict with the direction to refrain from affirmative conduct to obtain information. See *Thomas* v. *Cox,* 708 F.2d 132 (4th Cir. 1983), *cert. denied,* 464 U.S. 918 (1983) (distinguishes from *Henry* case in which informant, who was directed to listen to incarcerated defendant without asking questions, was not being paid for providing information).

Thus, close examination of the record in the present case reveals that, despite superficial similarities, it involves a substantially different set of circumstances from those that this Court addressed in *Henry.* Because the state did not, as in *Henry,* arrange to pay the informant on a contingent basis, it did not create a situation in which the informant, despite instructions to the contrary, would be likely to take affirmative measures to secure incriminating information from the accused. Moreover, unlike *Henry,* here it could not be said that it was the informant's conduct that induced the defendant to incriminate himself, for it was definitively established—and the state court's findings reflect—that Wilson acknowledged his guilt as a spontaneous reaction to a non-governmental stimulus—his brother's visit. In view of these distinctions, it is clear that the Court of Appeals erred in concluding that the introduction of Wilson's statements at his trial was unconstitutional under *Henry.*

D. Use at trial of statements that were not induced by conduct attributable to the state comports with the Sixth Amendment guarantee of the right to counsel.

Because Wilson's statements arose from impulses unconnected to any conduct on the part of the state or its agents, the Court may now address the situation that

the *Henry* majority expressly refrained from reaching: "the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Henry,* 447 U.S. at 271, n.9. As Justice Powell emphasized in his concurring opinion, "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." *Id.* at 276; *see also id.* at 280 (Blackmun, J., dissenting) ("The unifying theme of *Massiah* cases, then, is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel"). Consideration of the purposes underlying the Sixth Amendment and the historical underpinnings of *Massiah* and *Henry* should compel this Court to recognize that the right to counsel does not extend to a situation in which an informant complies with a detective's request to listen passively to a cellmate's unsolicited utterances.

When this Court announced, in *Powell* v. *Alabama,* 287 U.S. 45, 57 (1932), that criminal defendants are entitled to the assistance of counsel during the "critical period" from arraignment to trial, its primary focus was the need for "consultation, thoroughgoing investigation and preparation" for trial. Its holding reflected a recognition that, without such pre-trial preparation, the right to legal assistance at trial would be a hollow guarantee. Discussing the historical antecedents of the *Powell* decision, the Court in *United States* v. *Ash,* 413 U.S. 300 (1973), recognized two principal concerns from which the constitutional guarantee of counsel derived: the layman's need for "counsel as a guide through complex legal technicalities," *id.* at 307, and "a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309. The Court observed that the expansion of the right to counsel, in *Massiah* and other cases, to certain extra-judicial situations has been tied to those historical concerns and has turned on whether those situations entail "trial-like confrontations." *Id.* at 312. The test applied by the Court "has

called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313. Under that test, the right to counsel has been required at "critical confrontations" such as lineups, *United States* v. *Wade*, 388 U.S. 218 (1967), but not during the taking of handwriting samples, *Gilbert* v. *California*, 388 U.S. 263 (1967), blood tests, *Schmerber* v. *California*, 384 U.S. 757 (1966), or photographic identification procedures. *United States* v. *Ash*, 413 U.S. 300 (1973).

That test was clearly applied by the four concurring Justices in *Spano* v. *New York*, 360 U.S. 315 (1959), whose opinions were expressly relied upon in *Massiah*, 377 U.S. at 204-05. In *Spano*, the secret pre-trial interrogation of the defendant by the police was likened to a "kangaroo court procedure whereby the police produce the vital evidence in the form of a confession" and in which a "secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights." 360 U.S. at 325, 326. The recognition that the Sixth Amendment guarantee extends to such a situation clearly hinged on the existence of an adversarial confrontation between the state and the defendant.

In *Massiah*, the Court expanded upon the *Spano* rule by holding that governmental efforts to induce a confession from an indicted defendant are equally unconstitutional when the Government's method is surreptitious and indirect. 377 U.S. at 206. The *Massiah* Court did not, however, negate the importance of a confrontation between the government and the accused as a prerequisite to invocation of the Sixth Amendment right to counsel. Rather, it emphasized the continued necessity of such a confrontation by pointedly using the phrase "deliberately elicited." *See* Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L.J. 1, 42 (1978) ("The use of the term 'deliberately elicited' seems to be quite intentional"). In *Massiah*, there was no question that the Government was actively engaged in seeking to elicit incriminating statements by means of

Massiah's co-defendant, Colson, since the Customs investigator, who outfitted Colson's car with a radio transmitter, had instructed Colson to invite Massiah to take a ride with him and to engage him in conversation regarding the crimes with which he had been charged. *United States* v. *Massiah*, 307 F.2d 62, 66, 72 (2d Cir. 1962). *But see Beattie* v. *United States*, 377 F.2d 181 (5th Cir.), *rev'd. per curiam*, 389 U.S. 45 (1967) (summarily reversed holding that *Massiah* does not apply where defendant initiated meeting with informant at which government agent eavesdropped).*

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the Court continued to emphasize the "deliberately elicited" requirement. It found that case constitutionally indistinguishable from *Massiah* because "Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." *Id.* at 399. The Court noted that "no such constitutional protection [of the right to counsel] would have come into play if there had been no interrogation." *Id.* at 400. In the context of the *Brewer*

* In *Beattie*, Sirles, the informant, had been working with a government agent, McGinnis, prior to Beattie's arrest and had personally negotiated the unlawful sale of submachine guns that provided the basis for Beattie's indictment. When Beattie, while free on bail, requested that Sirles meet him, McGinnis equipped the informant with a radio transmitter and hid in the trunk of the informant's car with a tape recorder during the meeting. Under these circumstances, Circuit Judge Ainsworth reasoned that "the inference is inescapable that McGinnis expected appellant to incriminate himself during the meeting and that he wanted a recording of the conversations for use at the trial of the pending indictment" and that "Sirles must have realized that McGinnis wanted something incriminating out of appellant's mouth; otherwise it should have been pointless for McGinnis, with tape recorder, to hide in the trunk of Sirles's automobile." 377 F.2d at 193 (Ainsworth, C.J., dissenting). These factors indicative of purposeful efforts to obtain incriminating statements distinguish *Beattie* from the present case, in which the sole purpose for Lee's presence was to learn the identities of Wilson's accomplices and Lee had no connection to the charged crime that would render conversation regarding the pending charges a likelihood.

Moreover, it must be noted that the summary disposition of *Beattie* is not of the same precedential value as a full opinion by the Court. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). Indeed, this Court has never cited *Beattie* as authority in any subsequent opinion.

opinion, the term "interrogation" clearly was not meant as a synonym for "questioning," but rather, refers to conduct designed "to elicit information." *See id.* at 400, n. 6. Thus, the holding in *Brewer* is consistent with the line of cases applying the Sixth Amendment to extra-judicial adversarial confrontations. *See e.g., Escobedo* v. *Illinois,* 378 U.S. 478, 492 (1964) ("We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused *and its purpose is to elicit a confession*—our adversary system begins to operate and, under the circumstances here, the accused must be permitted to consult with his lawyer" [emphasis added]).

When the *Henry* majority declared that, "[w]hile affirmative interrogation, absent waiver, would certainly satisfy *Massiah,* we are not persuaded, as the Government contends, that *Brewer* v. *Williams* [citation omitted] modified *Massiah*'s 'deliberately elicited' test," [*Henry,* 447 U.S. at 271], it made clear that the reference to "interrogation" in *Brewer* should not be interpreted as a narrowing of the circumstances under which "deliberate eliciting" may be found. At the same time, it implicitly reaffirmed that *Massiah*'s requirement of "deliberate eliciting"—that is, of purposeful conduct by the government directed toward inducing a confession—has not been diminished. In *Henry,* that requirement was met by the Court's conclusion that "Nichols was not a passive listener," [*Id.* at 271], that "the informant was charged with the task of obtaining information from an accused," [*Id.* at 272, n. 10], and that "the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct." *Id.* at 274. Had there been no finding of deliberate, purposeful conduct on behalf of the Government, the application of the *Massiah* doctrine in *Henry* would have been inconsistent with the historical purposes of the Sixth Amendment, for there would have been no event at which "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Ash,*

413 U.S. at 316. Indeed, Justice Powell's concurring opinion explicitly stated as much.*

The situation in which the informant does not induce the incriminating statements has frequently been analogized to that in which an inanimate listening device records a defendant's statements. As the Ninth Circuit held, in *United States* v. *Hearst,* 563 F.2d 1331, 1347 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978), the surreptitious recording of a defendant's conversation with a jailhouse visitor does not impinge upon Sixth Amendment rights because of "the absence of a governmental effort to elicit incriminating statements from appellant." In *United States* v. *Franklin,* 704 F.2d 1183, 1189-90 (10th Cir.), *cert. denied,* 464 U.S. 845 (1983), the Tenth Circuit, in *dictum,* reached a similar conclusion with regard to a "passive listener." It reasoned that a statement volunteered by the defendant to his former wife, who consented to have her phone tapped by the FBI, but was neither paid nor instructed to elicit incriminating information, was not deliberately elicited and, hence, was not obtained in violation of the Sixth Amendment. *Cf. State* v. *Moulton,* 481 A.2d 155 (Maine 1984), *cert. granted sub. nom. Maine* v. *Moulton,* —— U.S. ——, 105 S. Ct. 1167 (1985) (Supreme Judicial Court of Maine found *Massiah* violation where, although police intended only to investigate new crimes, transcript of secretly recorded conversation revealed that informer/co-defendant was not merely a "passive listener," but pressed defendant for details of pending charges).

The circumstances of the present case compel a similar conclusion. Detective Cullen, through his instructions to Benny Lee, cautiously avoided creating an adversarial

* It should be noted that Chief Justice Burger, the author of the *Henry* opinion, joined in a dissenting opinion that declared: "The facts and language of *Massiah, Brewer,* and *Henry* clearly support" the interpretation of the Sixth Amendment ("*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action") advanced in Justice Powell's concurring opinion in *Henry. Snead* v. *Stringer,* 454 U.S. 988, 993 (1981) (Rehnquist, J., dissenting from denial of certiorari).

confrontation between Wilson and the state that would call into play his right to counsel. *See Wilson* v. *Henderson,* 584, F.2d 1185 (2d Cir. 1978) (Pet. App. E, p. 42a) ("The instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation"). Since, under the facts of this case, viewed in light of the presumptively correct state court findings, Wilson's incriminating statements were not the product of such a confrontation, their use at trial does not implicate the right to counsel. Therefore, this Court should hold that the purposes of the Sixth Amendment would not be served by—and do not require—the exclusion of the reliable evidence of Wilson's guilt contained in his unsolicited confession to his cellmate.

Conclusion

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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